

Court No. - 73

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 4645 of 2022

Applicant :- Manish Yadav

Opposite Party :- State of U.P.

Counsel for Applicant :- Ramesh Chandra Yadav, Ramashray
Tripathi

Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Ramesh Chandra Yadav, learned counsel for the applicant and the learned Additional Government Advocate for the State.

2. By means of present anticipatory bail application, the applicant has shown his apprehension of arrest in Case Crime No. 240 of 2021 u/s 147, 323, 354, 504, 506, 376 I.P.C., P.S, Shadiyabad, District Ghazipur. Learned counsel has submitted that the applicant

3. The attention has been drawn towards the impugned F.I.R. wherein the present applicant is not named and no allegation of any kind whatsoever has been leveled against him. Learned counsel for the applicant has submitted that having ulterior motive and extraneous design in her mind the informant has deliberately and intentionally not named the present applicant in the F.I.R. as she has stated herself as wife of the present applicant. At the time of lodging of F.I.R. she has given impression that she is wife of the present applicant.

4. The present applicant is an Army personnel serving in Indian Army, presently posted at Line of Control, China Border. He has got married with one Priya Yadav as certificate of marriage to that effect has been enclosed with the application as Annexure no. 4.

5. The learned counsel has further submitted that the present applicant is not married to the informant / complainant. Since the informant / complainant is not married wife of the applicant,

therefore, she could have not entered into the house of the present applicant in his absence showing herself as his wife when his family members were fully aware that he is married to Priya Yadav.

6. However, while recording her statement u/s 164 Cr.P.C., as per para 10 of the anticipatory bail rejection order passed by the learned court below, the complainant / informant has stated that she was having affair with present applicant since long and they got married in one temple.

7. Sri Yadav has submitted that no credible evidence has been provided to the investigating officer by the informant / complainant and the investigation is still going on.

8. The present applicant is posted at Line of Control, China Border and he could not know about any investigation being pending. As a matter of fact no summon to cooperate with the investigation is served upon the applicant nor any bailable or non-bailable warrant has been served upon the present applicant to cooperate with the investigation.

9. This Court in re: ***Vinod Kumar Singh @ Vinod Singh vs. State of U.P. in Case No. 5195 of 2021*** vide order dated 10.12.2021 was pleased to set aside the proclamation issued u/s 82 Cr.P.C. for the reason that before seeking proclamation u/s 82 Cr.P.C. the investigating officer has not taken prior steps and has not filed such application before the learned court below on affidavit. Therefore, in the aforesaid case the direction was issued to Director General of Police, U.P. to issue appropriate circular fixing guidelines to the effect that the investigating officer shall file affidavit before the court concerned apprising that he has taken all necessary steps seeking cooperation of the accused but the accused is not cooperating with the investigation.

10. In the present case no such affidavit has been filed by the Investigating Officer and no material was shown to the court-below to convince that before issuing proclamation all prior necessary

measures have been adopted by the Investigating officer concerned.

11. The Apex Court in re: ***Inder Mohan Goswami & another vs. State of Uttaranchal & others reported in (2007) 12 SCC 1*** has held that coercive process i.e. N.B.W. should not be issued lightly and it is incumbent upon the Court to verify such fact as to whether all prior necessary steps have been taken by the investigating officer or not. Therefore, as per Sri Yadav unless the prior necessary steps, so prescribed under the Cr.P.C., have not been taken by the investigating officer, the proclamation u/s 82 and 83 Cr.P.C. should not have been issued. The relevant paras of ***Inder Mohan Goswami (supra)*** are being reproduced herein below :

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.”

(Emphasis Supplied)

12. Therefore, as per Sri Yadav the proclamation, so issued against the present applicant is nonest in the eyes of law in view of the decision of Apex Court in re: ***Inder Mohan Goswami (supra)***.

13. Sri Yadav has further submitted that the present applicant has filed anticipatory bail application before the learned court-below prior

to issuance of proclamation issued u/s 82 and 83 Cr.P.C. inasmuch as his anticipatory bail application was filed in the month of April, 2022 and has been rejected on 30.4.2022. The proclamation u/s 82 Cr.P.C. has been issued by the court-below on 9.5.2022. Therefore, Sri Yadav has submitted that the bar so imposed by Apex Court to the effect that if the proclamation u/s 82 and 83 Cr.P.C. is issued, no anticipatory bail application can be entertained would not be attracted in the instant case inasmuch as when the present applicant has filed his anticipatory bail application before the court below, there was no proclamation u/s 82 Cr.P.C. Admittedly, such proclamation is issued after rejection of his anticipatory bail application by the learned court below.

14. The law is trite on the point that, if any person has filed any anticipatory bail application before the learned court below seeking anticipatory bail showing his reasonable apprehension of arrest in a case where the allegations of the prosecution prima facie do not corroborate with the material available on record and his / her anticipatory bail application is rejected, he / she has got a right to approach the High Court for such anticipatory bail and if in the interregnum period any proclamation u/s 82 & 83 Cr.P.C. is issued, it may be considered as a circumventive exercise being taken by the Investigating Officer. No one can be restrained from taking legal recourse strictly in accordance with law and such legal right may not be prevented even if any process is adopted by any authority which is not permissible under the law.

15. As per Sri Yadav since the present applicant is an Army personnel and presently posted at Line of Control, China Border, so the investigating officer / police concerned should have not harassed him and his family members in an issue wherein the allegations do not prima facie corroborate with the material available on record. Therefore, the liberty of the present applicant may be protected in view of dictum of Apex Court in re: ***Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98.***

16. Per contra, learned AGA has opposed the prayer of anticipatory bail but could not dispute the factual and legal submissions of Sri Yadav, learned counsel for the applicant. Learned AGA has submitted that the investigation is going on.

17. Heard learned counsel for the parties and perused the material on record.

18. The Hon'ble Apex Court in re: ***State of Madhya Pradesh vs. Pradeep Sharma reported in (2014) 2 SCC 171*** has held that a person against whom a proclamation has been issued u/s 82/83 Cr.P.C. would not be entitled for the benefit of anticipatory bail.

19. Considering the aforesaid judgment i.e.: ***Pradeep Sharma (supra)*** the Apex Court in re: ***Prem Shanker Prasad vs. State of Bihar (Criminal Appeal No. 1209 of 2021)*** vide judgment and order dated October 21,2021 has observed that if anyone is declared as an absconder / proclaimed offender in terms of section 82 of the Code (Cr.P.C.), he is not entitled to get the relief of anticipatory bail.

20. In view of the aforesaid decision of Apex Court in re: ***Pradeep Sharma (supra)*** and ***Prem Shankar Prasad (supra)*** if any accused person is declared absconder by the competent court, he would not be entitled to get anticipatory bail.

21. In the present case the record reveals that when the applicant has filed the anticipatory bail application before the learned court below there was no proclamation u/s 82 Cr.P.C. Such proclamation has been issued after the rejection of anticipatory bail application of the present applicant by the learned court below, therefore, the bar to entertain anticipatory bail application after issuance of proclamation u/s 82 Cr.P.C. would not be attracted in the present case.

22. The anticipatory bail application can be filed u/s 438 Cr.P.C. either before the High Court or before the court of sessions. However, normally a person should approach the Court of sessions

and if the anticipatory bail application is rejected, the High Court can be approached under same section i.e. section 438 Cr.P.C. Therefore, for filing anticipatory bail application both the aforesaid courts have got concurrent powers.

23. In the present case it appears that when the anticipatory bail application of the present applicant was rejected on 30.4.2022, an application for seeking proclamation order was filed by the Investigating Officer and such order has been issued on 9.5.2022. Further, the proclamation order dated 9.5.2022 does not disclose that the investigating officer has filed an affidavit before the learned court concerned to convince that all prior steps which are required under the law have been taken; as to whether the summons, bailable warrant and non-bailable warrant have been served upon the applicant or not; as to whether before issuing the non-bailable warrant against the present applicant the learned court below has convinced itself about the service of summons and bailable warrants.

24. In the present case the informant / complainant has not leveled any allegation against the present applicant in the F.I.R. As a matter of fact, the present applicant is not named in the F.I.R.. It is beyond any comprehension that if the informant / complainant was having any grievance, more so genuine grievance against the present applicant, any sort of allegation would have been leveled in the F.I.R., therefore, the allegations are subject to the investigation which is under progress and it is legitimately expected that such investigation shall be conducted and concluded strictly in accordance with law.

25. The Apex Court has restrained the proclaimed offender to seek anticipatory bail. The person who is not following the process of law and deliberately avoiding the investigation despite all necessary steps have been taken by the investigating officer to apprise him to cooperate with the process of investigation, e.g. summons have been served but to no avail, thereafter bailable warrants have been served but again he / she is not cooperating with the investigation for

no plausible and cogent reasons, lastly non-bailable warrant has / have been served but there is no heed thereon, then the investigation officer has got no option except to seek proclamation u/s 82 / 83 Cr.P.C. It is also relevant to note here that the court concerned must ensure before taking any coercive steps that all the aforesaid proceed, i.e. summons, bailable warrants and non-bailable warrants have been duly served upon the person and he / she is deliberately avoiding the same. Issuing summons, bailable warrant and non-bailable warrants would not suffice but what is most important is its service upon the person because unless and until such process is served no further coercive step should be taken in view of the dictum of Apex Court in re: ***Inder Mohan Goswami (supra)*** inasmuch as these coercive steps are directly related with the liberty of the person which is protected under Article 21 of the Constitution of India.

26. Therefore, if the aforesaid process is avoided by the person, any appropriate application for seeking proclamation can be filed by the investigating officer supporting with an affidavit to apprise the court concerned as to how despite the summon, bailable warrant and non-bailable warrant having been served upon the person he / she is deliberately avoiding to cooperate with the investigation and the court after having proper satisfaction on the averments of such application may issue proclamation. Only under these circumstances that person may be declared as proclaimed offender and his / her anticipatory bail application should not be heard. In other words, before filing anticipatory bail that person should be proclaimed offender and his / her anticipatory bail application will lose the right of hearing on merits.

27. In the present case when the applicant filed his anticipatory bail application, he was not a proclaimed offender. His right to file such application before this court was consequential as he could have approached the High Court u/s 438 Cr.P.C. after rejection of his application by the sessions court which was also filed u/s 438 Cr.P.C.

Therefore, when the present applicant filed his application u/s 438 Cr.P.C. he was not a proclaimed offender so the bar imposed by the Apex Court entertaining anticipatory bail of the proclaimed offender would not attract in the present case.

28. Therefore, in view of what has been considered above and also in view of dictum of Apex Court in re: **Sushila Aggarwal (supra)**, I find it appropriate that the liberty of the present applicant be protected till filing of the police report, u/s 173(2) Cr.P.C. and if any charge-sheet is filed, the liberty of the present applicant shall be protected till conclusion of trial.

29. Having heard learned counsel for the parties and having perused the material available on record, the present anticipatory bail application is **allowed**.

30. Therefore, it is directed that in the event of arrest, applicant- **Manish Yadav** shall be released on anticipatory bail in the aforesaid case crime number on his furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the arresting authority/ court concerned with the following conditions:-

1. that the applicant shall make himself available for interrogation by a police officer as and when required;
2. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;
3. that the applicant shall not leave India without the previous permission of the court;
4. that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;
5. that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

9.

6. that the applicant shall not pressurize/ intimidate the prosecution witness;

7. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

8. that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

[Rajesh Singh Chauhan,J.]

Order Date :- 14.7.2022
Om.